IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 1261 OF 1999

Lagwad Adhikari and ors. ..Petitioners

Vs.

Shri Yasin Hamid Sayyad ..Respondent

WITH

WRIT PETITION NO. 4083 OF 1999

Lagwad Adhikari and ors. ..Petitioners

Vs.

Shri Kantilal Sadashiv Atole ..Respondent

WITH

WRIT PETITION NO. 4087 OF 1999

Lagwad Adhikari and ors. ..Petitioners

Vs.

Shri Uttam Maruti Atole ..Respondent

WITH

WRIT PETITION NO. 5027 OF 1999

Lagwad Adhikari and ors. ..Petitioners

Vs.

Shri Anna Nivritti Atole ..Respondent

WITH

WRIT PETITION NO. 5028 OF 1999

Lagwad Adhikari and ors. ..Petitioners

Vs.

Shri Jagnnath Babu Bhalekar ..Respondent

WITH

WRIT PETITION NO. 4732 OF 2000

Plantation Officer & 3 ors. ..Petitioners

Vs.

Shri Tanaji Nandu Pagade ..Respondent

WITH

WRIT PETITION NO. 5208 OF 2000

Deputy Director & 1 anr. ..Petitioners

Vs.

Shri N.K. Bhangardive ..Respondent

WITH

WRIT PETITION NO. 5217 OF 2000

Plantation Officer and ors. ..Petitioners

Vs.

Shri Dhanaji Dajiram Dodke ..Respondent

Mr. A.P. Vanarase, AGP for petitioners.
Mr. Rajiv Patil for respondent in all the matters.

CORAM: B.H. MARLAPALLE, J.

Date : December 04, 2007.

ORAL JUDGMENT:

1. All these petitions have been filed by the Plantation Officer, Social Forestry Department at Shirur, District Pune and the Deputy Director of Social Forestry as well as the State Government

challenging separate orders passed by the Industrial Court at Pune in the respective complaints filed by the daily rated temporary appointees as watchman/ labour and the common relief of granting permanency with consequential benefits has been granted by these orders. Petitions involved common questions of fact and law and, therefore, they are being decided by a common judgment.

2. The complainants who claimed to have been appointed as daily rated watchmam/labour at the Plantation Centres in Shirur Taluka of Pune District claimed that they had worked continuously for more than five years (six to ten years) and in every year they had completed 240 or more days of service in the preceding five years and, therefore, they were entitled for the benefit of permanency. The complaints were filed under Items 5, 6, 9 and 10 of Schedule IV of the Maharashtra Recognition of Trade Unions & Prevention of Unfair Labour Practices Act, 1971 (for short the Act) read with Section 28(1) therein. In short, the claim made by the complainants was that they were doing the same type of work which

the permanent employees of the Social Forestry Department posted in the Plantation Centers were doing, the employment was uninterrupted and work was available. For the same work the department had its own permanent employees as well as temporary daily rated, like the complainants and this was being done to deprive them benefits of permanency like regular payscale, pension and other retiral benefits as available to the permanent employees. They further claimed that the Industrial Disputes Act, 1947 was applicable to them and in any case the daily rate of wages was increased from Rs.12/- to Rs.31.70 and their seniority was not maintained. If there was any discontinuation in some months it was only by way of artificial break. They had submitted various representations through their Union seeking the benefits of permanency but no action was taken. All these complaints were filed between the period from December, 1994 to March, 1996. There was no reference to any statutory provisions or any Rule entitling them to be made permanent on account of continuous service of more than five years with more than 240 days of work in every year. No Government Circular was relied upon or any Government Resolution referred to when the

complaints were filed for seeking the benefits of permanency. It was not the case of the complainants initially when the State Government had taken a policy decision to regularise all such complainants and others were regularised and the complainants were denied the said benefit.

3. By the impugned Judgment and Order the Industrial Court at Pune held that there was no case of unfair labour practice either under Item 5 or Item 10 of Schedule IV of the Act, but the complainants had proved that the department of Social Forestry was guilty of engaging in unfair labour practices within the meaning of Items 6 and 9 of Schedule IV of the Act. It ought to be noted at this stage itself that during the pendency of the complaints and more so when the recording of evidence had commenced in all these complaints the Government of Maharashtra issued a Resolution on 19/10/1996 thereby announcing a scheme for creation of 1164 Group -D supernumerary posts and the complainants while in the witness box relied upon the said GR for considering their complaints only by way of oral depositions that despite they were

eligible for the benefits of the said GR, their cases were not considered for permanency against 1164 supernumerary posts created by the same. The Plantation Officer who stepped in the witness box to defend the complaints, admitted that the GR was issued and that the complainants' cases were not considered for regularisation under the said GR. One of the reasons stated in the oral depositions was that the complainants had either worked under the Employment Guarantee Scheme or the Jawahar Rojgar Yojana and, therefore, they were disqualified for claiming benefit of permanency under the GR dated 19/10/1996.

. The learned Member of the Industrial Court held that the GR dated 19/10/1996 was applicable to each of the complainants, each of them had completed more than five years of service and in each year during all these five years everyone of them had put in more than 240 days of work as daily rated labourers and, therefore, the present petitioners were guilty of unfair labour practices within the meaning of Items 6 and 9 of Schedule IV. The Industrial Court discarded the contentions of the petitioners that the

complainants were not entitled for the benefits of the said GR dated 19/10/1996 as they had worked for some time or for most of the time either under the Employment Guarantee Scheme or the Jawahar Rojgar Yojana. The Industrial Court referred to the oral depositions of the Plantation Officer and held that he could not, with certainty, say that these complainants had worked either under the Employment Guarantee Scheme or the Jawahar Rojgar Yojana. It is thus clear that the findings recorded by the Industrial Court are solely based on the GR dated 19/10/1996 which undoubtedly is applicable to the Social Forestry Department.

4. Mr. Vanarase, the learned AGP submitted that the evidence brought on record clearly indicated the non availability of permanent sanctioned posts in Group - D at the respective establishments where the complainants were engaged or at any place in Pune District and that the complainants were engaged as daily rated labourers either for plantation work or as watchman. Initially their daily rate of wage was Rs.12/- and it was increased to Rs.31.70. None of the

complainants had any vested right of being made permanent in terms of any Rules or statutory provisions. As per Mr. Vanarase when such temporaries were being engaged due to non availability of permanent sanctioned posts, the department concerned cannot be held to have engaged in any acts of unfair labour practice within the meaning of Item 6 of Schedule IV of the Act, as has been the well settled position in law. He further submitted that the GR dated 19/10/1996 was not applicable to any of the complainants as it has come in the evidence of the Plantation Officer that for some days in the entire period or in some years the complainants had worked either under the Employment Guarantee Scheme or the Jawahar Rojgar Yojana and this evidence brought on record through the Plantation Officer was not disputed. As per Mr.Vanarase complainants were, therefore, not entitled for the benefits of the said GR. In support of the challenge to the impugned orders, Mr. Vanarase has relied upon the Constitution Bench decision in the case of Secretary, State of Karnataka and ors. vs. Umadevi (3) and ors. **[(2006) 4 SCC 1]** and Marathwada Agricultural University & ors. vs. Marathwada Krishi Vidyapith, M.S.K.S and ors.

[AIR 2007 SC 2969] and Mahatma Phule Agricultural University and ors. vs. Nasik Zilla Sheth Kamgar Union and ors. **[AIR 2001 SC 3228]**.

5. Mr. Patil the learned counsel appearing for the complainants has, on the other hand, supported the impugned orders passed by the Industrial Court. By referring to the oral depositions, Mr. Patil pointed out that every complainant had put in more than five years of continuous service within the meaning of Section 25B of the Industrial Disputes Act, 1947 and everyone of them was entitled for being regularised against the supernumerary post created under the GR dated 19/10/1996, the Plantation Officer could not give satisfactory reasons as to why the cases of the complainants were not processed for regularisation and it was not the case of the department that their cases were not processed because they were disqualified. As per Mr. Patil unless the present petitioners by evidence before the Industrial Court proved that the complainants were not eligible for permanency against the supernumerary post, the Industrial Court was right in holding that the said GR was applicable to the

complainants and they were entitled for the benefits of permanency. Mr.Vanarase, at this stage, reiterated his contentions that the complainants being the back door entrants, they were not entitled for the benefits of permanency/regularisation as has been held by the Constitution Bench in Umadevi's case (Supra).

6. The short question this court is required to consider is, whether the findings of the Industrial Court holding the present petitioners guilty of unfair labour practices within the meaning of Items 6 and 9 of Schedule IV of the Act are justified. Items 6 and 9 of Schedule IV of the Act reads as under:-

> 6. To employ employees as "badlis", casuals or temporaries and to continue them as such for years, with the object of depriving them of the status and privileges of permanent employees.
>
> 9. Failure to implement award, settlement or agreement.

. It is a well settled position in law that when badlis, casuals or temporaries are continued for years together on account of non availability of permanent sanctioned posts, failure for their absorption in the respective posts either Class - D or Class - C per se, is not an act of unfair labour practice within the meaning of Item 6 of Schedule IV of the Act.

. In the case of Punjabrao Krishi Vidyapeeth, Akola vs. General Secretary, Krishi Vidyapeeth Kamgar Union and ors. **[1994 I CLR 913]**, a Single Bench of this court (Hon'ble Shri Justice V.S. Sirpurkar as His Lordship then was) considered the scope of Item 6 of Schedule IV and posed the following questions:-

> "What then is the position of an employer who does not have the authority to employ such person permanently owing to a provision of law? Could it be said that an employer who is specifically prohibited from granting the status of permanency by creating posts is also covered under the language of Schedule IV, Entry 6?

. In para 8 His Lordship replied these questions as under:-

". The answers to these questions will depend upon the true interpretation of this entry. Now, the plain language of entry No.6 suggests that in continuing the employees as casuals or temporaries, there must be a definite object of depriving such workers of their rightful benefits. Then and then alone, this practice could be covered under the entry. How would that object be discerned is the question? By mere showing that there has been a practice of continuing the employees in the manner as shown above, does the complainant discharge his burden? The answer must be given in the negative. It is true that a continued practice of continuing the employee for years together as a badli employee or a temporary employee may definitely raise a finger of suspicion regarding the intention of that employee. However, in order to hold such employer guilty

> of such unfair labour practice as described in entry 6, something more is required. There must be "tangible evidence" to show that this was deliberately done. The words "with the object of" connote intention or mens rea on the part of employer, or a certain design in his mind to achieve certain results. Without that vital intention or that certain design, the employer cannot be dragged in....."

This view has been confirmed by the Apex Court in the case of Mahatma Phule Agricultural University (Supra). In para 14 their Lordships reproduced Item 6 of Schedule IV of the Act and stated as under:-

> "The complaint was against the Universities. The High Court notes, that as there were no posts the employees could not be made permanent. Once it comes to the conclusion that for lack of posts the employees could not be made permanent how could it then go on to hold that they were continued as "badlis", casuals or temporaries with the object of depriving them of the status and privileges of

permanent employees. To be noted that the complaint was not against the State Government. The complaint was against the Universities. The inaction on the part of the State Government to create posts would not mean that an unfair labour practice had been committed by the Universities. The reasoning given by the High Court to conclude that the case was squarely covered by Item 6 of Schedule IV of the MRTU and PULP Act cannot be sustained at all and the impugned Judgment has to be and is set aside....."

7. Even otherwise in the impugned orders there is no reasoning set out in support of the finding that the present petitioners were guilty of unfair labour practice within the meaning of Item 6 of Schedule IV of the Act. The Industrial Court has mainly allowed the complaints, as noted earlier, on the basis of the GR dated 19/10/1996 and by holding that the Department failed to implement the GR issued by the Government. In these circumstances, the finding recorded by the Industrial Court holding the petitioners guilty of

unfair labour practice under Item 6 of Schedule IV of the Act is unsustainable and the same deserves to be quashed and set aside.

8. Now coming to the second issue regarding unfair labour practice under Item 9 of Schedule IV of the Act, it needs to be noted, though by way of repetition, that in the complaints there was no pleading based on the GR dated 19/10/1996 as the complaints were filed earlier. Even otherwise no steps were taken to amend the complaints so as to rely upon the GR dated 19/10/1996. The Plantation Officer (CW-1) was asked on the said GR and the eligibility of the complainants for regularisation under it. When there was no pleading in the complaints, obviously the Department did not have an opportunity to deal with the same. If the complaints were to be amended so as to rely upon the GR dated 19/10/1996, it could have been possible for the petitioners to deal with the same and come out with specific reasons as to why the complainants were not eligible under the said GR. In his oral depositions the Plantation Officer stated that though the complainants had put in five years of

work and in each year they had put in 240 days of service or more, they were not entitled for the benefit of the said GR as they were engaged under the Employment Guarantee Scheme or the Jawahar Rojgar Yogna and this has not been taken into consideration by the Industrial Court only on the ground that the Plantation Officer was not sure whether the complainants had worked in either of the scheme or in both the schemes. However, Mr.Patil the learned counsel appearing for the complainants has referred to the Maharashtra Employment Guarantee Rules, 1979 framed under Section 17 of the Maharshtra Employment Guarantee Act, 1977. Rule 5 of the said Rules provides for registration for employment and Rule 6 therein deals with the procedure for making application for employment. In short, it is the contention of Mr.Patil that unless any of the complainants had registered for employment and they had followed the procedure under the Employment Guarantee Scheme, they could not have been employed and, therefore, the statement made by the Department that the complainants were working under the Employment Guarantee Scheme was required to be discarded. Be that as it may, the fact remains that

if such a pleading was taken in the complaints, the Department would be in a position to come out with the reasons as to why any of the complainants were not considered for regularisation under the GR dated 19/10/1996 rather than the Plantation Officer being taken by surprise while in the witness box. To decide the issue of eligibility of the complainants under the said GR is a mixed question of fact and law and unless the factual details regarding their employment were brought on record, it would not be permissible for the Industrial Court to record a finding that they were covered under the said GR.

9. In Writ Petition Nos. 4083/99 and 4087/99 the statement regarding the employment details (Exh.C-19 at Sr.No.2) went to show that in the Department there were four different schemes, namely, Employment Guarantee Scheme, D.P.P (District Plantation Programme), Plant and Social Forestry Project. The said statement shows that for the period from 1/11/1989 to 31/10/1990 the complainant i.e. Shri Kantilal Atole worked for total 251 days and from the same for 141 days he worked under the Employment

Guarantee Scheme and remaining 110 days he worked under the Plant Scheme. For the period from 1/11/1990 to 31/10/1991 he worked for 250 days and all the days under the Plant Scheme. For the period from 1/11/1991 to 31/10/1992 he worked for total 245 days and out of the same 115 days under the Social Forestry Project and remaining 130 days under the Plant Scheme. For the period from 1/11/1992 to 31/10/1993 he worked for 316 days and all the days under the Plant Scheme. For the period from 1/11/1993 to 31/10/1994 he worked for total 288 days and all the days under the Plant Scheme. During the period from 1/11/1994 to 31/10/1995 he worked for 296 days, out of which 105 days under Employment Guarantee Scheme and 191 days under the Plant Scheme. For the period from 1/11/1995 to 31/10/1996 he worked for 318 days and all the days under the Plant Scheme. In the GR dated 19/10/1996 the cutoff date for eligibility was 1/11/1996 and it is an admitted position that merely because the daily wager under the Social Forestry Department had worked for continuously for five years or more, he was not entitled for being regularised under the supernumerary posts created. There is specific disqualification clause which states that while calculating the period

of five years, the period worked under the Employment Guarantee Scheme or any other similar scheme will not be taken into consideration and the above stated details, at least prima facie, made out a case in support of the contentions of the Plantation Officer (CW-1) that the complainants were not considered for the benefit of the GR dated 19/10/1996 because they were employed under the Employment Guarantee Scheme or some other Scheme for some time or the other during the period of five years. The Industrial Court fell in manifest error in not considering this aspect.

10. There is one more issue which requires consideration, though may not be in all these cases and i.e. regarding calculating 240 days of work in one year. It is well settled that if a workman is paid on daily wages he does not get the benefit of weekly holidays and paid holidays for being taken into consideration for deciding the working days and only when a workman is monthly rated, such days are counted for calculating 240 days for a continuous period of one year within the meaning of Section 25B of the Industrial Disputes Act, 1947. There is one more

important aspect regarding the eligibility of the daily rated temporaries/causals right for permanency on having put in such service for number of years, while engaged for such long period under a Scheme. Mr.Vanarase in this regard relied upon the Constitution Bench decision in Umadevi's case (Supra). In the case of Delhi Development Horticulture Employees' Union vs. Delhi Administration, Delhi and ors. **[AIR 1992 SC 789]** the issue of regularisation in service merely on account of completion of 240 days of work under Jawahar Nehru Rojgar Yojana was considered by the Supreme Court and it has been held that the casuals/temporaries working under such Schemes were not entitled to claim regularisation in service.

Their Lordships stated,

> ".....Those employed under the scheme, therefore, could not ask for more than what the scheme intended to give them. To get an employment under such scheme and to claim on the basis of the said employment, a right to regularisation is to frustrate the scheme itself. No Court can be a party to such exercise. It is wrong to approach the

problems of those employed under such schemes with a view to providing them with full employment and guaranteeing equal pay for equal work. These concepts, in the context of such schemes are both unwarranted and misplaced. They will do more harm than good by depriving the many of the little income that they may get to keep them from starvation. They would benefit a few at the cost of the many starving poor for whom the schemes are meant. That would also force the State to wind up the existing schemes and forbid them from introducing the new ones, for want of resources. This is not to say that the problems of the unemployed deserve no consideration or sympathy. This is only to emphasis that even among the unemployed a distinction exists between those who live below and above the poverty line, those in need of partial and those in need of full employment, the educated and uneducated, the rural and urban unemployed etc.

> ....The Courts can take judicial notice of the fact that such employment is sought and given directly for various illegal consideration including money. The employment is given first for temporary periods with technical breaks to circumvent the relevant rules, and is continued for 240 or more days with a view to give the benefit of regularisation knowing the judicial trend that those who have completed 240 or more days are directed to be automatically regularised. A good deal of illegal employment market has developed resulting in a new source of corruption and frustration of those who are waiting at the Employment Exchanges for years....."

11. The issue of regularisation of the temporary workers employed for years together in the Government departments was again considered in the case of State of Haryana vs. Piara Singh **[AIR 1992 SC 2130]**. While holding that such benefit could not be granted only on the basis of such temporary period which could be even for years together, the court stated,

"Ordinarily speaking, the creation and abolition of a post is the prerogative of the Executive. It is the Executive again that lays down the conditions of service subject, of course, to a law made by the appropriate legislature. This power to prescribe the conditions of service can be exercised either by making Rules under the proviso to Article 309 of the Constitution or (in the absence of such Rules) by issuing Rules/instructions in exercise of its executive power. The Court comes into the picture only to ensure observance of fundamental rights, statutory provisions, Rules and other instructions, if any, governing the conditions of service. The main concern of the Court in such matters is to ensure the Rule of law and to see that the executive acts fairly and gives a fair deal to its employees consistent with the requirements of Articles 14 and 16. It also means that the State should not exploit its employees nor should it seek to take advantage of the helplessness and misery of either the

unemployed persons or the employees, as the case may be. As is often said, the State must be a model employer....."

12. Seeking regularisation in public employment must satisfy the requirements that the selection so made was as per the procedure prescribed under the Rules framed under Article 309 of the Constitution or any other Rules/instructions issued by the State Government in the absence of such Rules, the eligibility in terms of qualification and experience, the age limit, the aspect of reservation of seats depending upon the social status. For such public appointment on regular basis all eligible candidates must have a fair opportunity to apply, compete and face the selection process which ought to be transparent and fair. In short, the selection has to be on merits. The employees who are appointed on temporary basis either on daily wages or on monthly wages may be eligible to apply for such posts but merely because they worked for years together as temporaries or casuals directly engaged by the Department or by some Officer and without going through the selection process prescribed for Group D

and C categories cannot claim regularisation in service only on the basis of the length of their service. The issue has been now well settled by the Constitution Bench judgment in Umadevi's case (Supra). It is clear that regularisation could be asked for by those who have come through the normal selection process prescribed under the Rules or notifications and not by those who are popularly called as the back door entries.

13. In the instant cases, the complainants, as noted earlier, in the complaint had merely stated that they were entitled to be regularised only on account of more than five years of continuous service and that the provisions of the I.D. Act were applicable to them. While the evidence was being recorded they relied upon the GR dated 19/10/1996 and claimed that they were entitled to be regularised against the supernumerary 1164 posts created by the State Government in the Social Forestry Department. The Industrial Court accepted these contentions without there being any opportunity for the department to deal with the same and even otherwise the witness for the

department (CW-1) gave specific reasons as to why they were not eligible for the benefit of regularisation under GR dated 19/10/1996. This aspect was required to be examined on the basis of oral and documentary evidence that could have been adduced if the complainants have amended the complaints and the same was not done. I am, therefore, satisfied that the finding recorded by the Industrial Court holding the present petitioners guilty of unfair labour practice under Item 9 of Schedule IV of the Act is patently erroneous and the same deserves to be quashed and set aside.

14. Mr. Patil has relied upon the decision of this court in the case of Navnath Maruti Chavan vs. Conservator of Forest, Pune and anr. **[2006 (1) Mh.L.J. 710]** and Mr.Vanarase the learned AGP points out that the same is under challenge in LPA (Stamp) No. 56 of 2007. It is not known whether the complainant therein has relied upon the GR dated 19/10/1996 and in any case the said GR is not applicable to the Forest Department. Therefore, Navnath Chavan's case (Supra) does not support the

view taken by the Industrial Court.

15. In the premises, these petitions succeed and they are hereby allowed. The impugned Judgment and Order rendered by the Industrial Court in the respective petitions is hereby quashed and set aside and Complaint (ULP) Nos.370/94, 130/96, 522/96, 64/96, 46/97, 128/96, 562/90 and 124/96 are hereby dismissed.

. Rule is made absolute accordingly with no order as to costs.

16. By way of clarification, it is stated that in case the supernumerary posts created by the GR dated 19/10/1996 are not filled in as of now, this order will not preclude the complainants to submit a representation to the Deputy Director, Social Forestry Department, Pune.

(B.H. Marlapalle,J.)